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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-45

RICHARD B. PESIKOFF, ET AL., PETITIONERS

v.

THE SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The district court rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1974. A petition for rehearing was denied on May 31, 1974. The petition for a writ of certiorari was filed on August 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the complaint was properly dismissed for failure to state a cause of action where it alleged that an alien labor certification should be granted

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under 8 U.S.C. 1182(a)(14) because no American live-in maids were available, although the Secretary of Labor had determined that the live-in requirement was a personal preference of the employer and that there was a large pool of qualified American workers available.

2. Whether the failure to publish interpretative internal memoranda of the Department of Labor voids the instant denial of labor certification in spite of the fact that petitioner was not adversely affected by the memoranda and the Secretary did not refer to them in either his denial or subsequent defense of that denial.

3. Whether the court of appeals committed reversible error by referring in passing to alternative grounds for affirming the decision which were not explicitly stated by the Secretary.

STATUTE INVOLVED

8 U.S.C. 1182(a)(14) provides in pertinent part:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at

> the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. * * *

STATEMENT

Petitioner Pesikoff, a Houston child psychologist, and his wife, a law student, sought a live-in maid to care for their two children and to handle various household chores. They entered into a contract with the alien petitioner, Maria De Jesus Quintero, for her to work for them as a live-in maid.

Pursuant to the appropriate administrative procedure, petitioners requested that the Secretary of Labor ("The Secretary") issue the necessary certification under 8 U.S.C. 1182(a)(14) to obtain special immigrant status for petitioner Quintero.[1] They rep-

[1] Before an alien in the position of petitioner Quintero may obtain special immigrant status for the purpose of employment, the Secretary of Labor must certify to the Secretary of State and the Attorney General, pursuant to 8 U.S.C. 1182(a)(14), that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available for the job which the alien has been offered, and (B) that the alien's employment will not adversely affect the wages and working conditions of similar workers in the United States.

The Secretary of Labor has delegated his power to issue labor certifications to the office of the Manpower Administration for the area wherein the employment is to occur. 29 C.F.R. 60.4 (a). For aliens in the circumstances of petitioner, application must first be made to the State Employment Service, which evaluates the market for people qualified to fill the job in question; the State Employment Service forwards its report and information to the office of Manpower Administration. 29 C.F.R. 60.3(c). A certifying officer appointed by the Assistant Regional Manpower Administrator makes the denial determination based on the

resented that Quintero's work day would be 8 a.m. to noon and from 2 p.m. until 6 p.m. (Pet. App. 2a). This request was initially denied in a form letter from a Department of Labor Manpower Administration officer in Dallas, Texas, stating "U.S. workers are available" (A.R.A., letter of July 28, 1971 from United States Department of Labor;[2] Pet. App. 2a–3a). Prior to the denial the certifying officer had received a report from the Houston office of the Texas Employment Commission which indicated that there were approximately 180 maids in the area who were seeking employment. The report ended with the following paragraph under "other comments" (A.R.A., Transmittal memorandum of July 20, 1971):

> There are approximately 180 Maids, General registered in the Local Office; there are also approximately 125 Dayworkers who are seeking work and are paid at the rate of $1.25 per hour, but the Local Office states that 75% of Maids, General and Dayworkers are working one to three days a week, but their application cards are kept active while they are seeking extra days to fill the week. Many change jobs frequently and definitely are not interested in live-in work. Very few will accept jobs that require cooking. In contacts with employers advertising in the newspapers for domestics, it

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State Employment Service's report and other available information. 29 C.F.R. 60.4(a). Appeal from the certifying officer's determination lies to the Assistant Regional Manpower Administrator or a designated reviewing officer, whose determination is final. 29 C.F.R. 60.4(c).

[2] The administrative record on appeal, a copy of which is being lodged with the clerk of this Court, will be cited "A.R.A.", followed by a reference to the specific document cited.

> is found that the response is fair, they find that it is seldom they can find an applicant who is desirable, or who can furnish valid references. * * *

The certifying officer's decision was affirmed by the Assistant Regional Manpower Administrator, who stated (A.R.A., letter of September 8, 1971 from Assistant Regional Manpower Administrator):

> Under Section 212(a)(14) of the Immigration and Nationality Act, as amended, it is the responsibility of the Department of Labor to protect the job opportunities and wages and working standards of the United States labor force. An alien may not be certified for employment if there are U.S. workers available or if the alien's employment would adversely affect similarly employed U.S. workers. These provisions of the law apply to all aliens as long as they are seeking to enter for employment.
>
> The job duties listed in the application for a live-in worker do not differ from those required of a dayworker. When the job duties and conditions of employment are those normally identified with dayworkers, the Department of Labor cannot grant certification for employment of immigrant live-in workers.
>
> Based on the job described and the hours of work, the live-in requirement is a personal preference and not a necessity in the performance of the job.
>
> At the time of the employer's application, we were advised by the local office of the Texas Employment Commission that there were 180 qualified and available U.S. workers for the job offered the alien, but that none was willing to live-in. * * *

Petitioners then filed suit in the United States District Court for the District of Columbia, seeking a declaratory judgment (under 28 U.S.C. 2201) that the denial of the labor certification was "arbitrary, an abuse of discretion, [and] contrary to law." They alleged, *inter alia,* that petitioner Pesikoff required a live-in maid and that none was available in the Houston area. The district court dismissed the complaint for failure to state a cause of action (Pet. App. 33a), and the court of appeals affirmed, holding that "we find proper the Secretary's treatment of Dr. Pesikoff's live-in requirement for his maid as a personal preference irrelevant to determination of whether there was in Houston a pool of potential workers willing to perform the Pesikoffs' domestic tasks" (Pet. App. 10a).

ARGUMENT

1. The district court correctly concluded that petitioners' complaint did not state a cause of action. The complaint focused almost exclusively on petitioner's desire for a *live-in* maid (Appendix in Court of Appeals, pp. 2–4, pars. 5, 6, 8, 12). The Secretary properly found that the duties petitioner allegedly desired to be performed from 8 a.m. to noon and 2 p.m. to 6 p.m. could be performed by persons who did not live in. Petitioner gave no reason for his desire that the maid live in his household. Petitioners' assertion of a shortage of live-in help thus did not state a cause of action.

The Secretary may determine which characteristics desired by a prospective employer are essential to the performance of the job, and which are merely optional or desirable. If this were not so, every employer could

request qualities tailored specifically to the prospective immigrant, and the intent of Congress would be defeated. As the court of appeals stated (Pet. App. 10a–11a):

> * * * we find proper the Secretary's treatment of Dr. Pesikoff's live-in requirement for his maid as a personal preference irrelevant to determination of whether there was in Houston a pool of potential workers willing to perform the Pesikoffs' domestic tasks. If the Secretary were required to find an individual American worker who met all the personal specifications of the prospective employer of each alien seeking Section 212(a)(14) certification, the burden on him in performing his statutory duty to protect the American labor market would be much greater than Congress intended in passing the 1965 amendments to the Act. It is well within the Secretary's discretion to ignore employer specifications which he deems, in accordance with his labor market expertise, to be irrelevant to the basic job which the employer desires performed. The Secretary may, therefore, survey the available labor market for a class of workers who, while possibly not meeting the prospective employer's personalized job description, do provide the employer with the potential for getting his job accomplished. The Secretary's treatment and classification of Dr. Pesikoff's employee request as one for a general maid who could live in or out was an appropriate exercise of the above described discretion. Dr. Pesikoff's statement to the Labor Department that Ms. Quintero would work only from 8:00 to 12:00 noon and 2:00 p.m. to 6:00 p.m. indicates that her need to live in is not

> significantly different from that of millions of American workers who reliably and adequately perform their duties without living at their employment site.

Hence, even if petitioners had been allowed to prove, as they alleged, that there were no live-in maids available, a cause of action would not have been established since the Secretary had reasonably determined that there were qualified American workers available who, while not willing to live in, could satisfy the essential elements of petitioner's job requirements.

2. Petitioners argue that there is a conflict in the circuits on the issue of the burden of proof (and the related issue of the sufficiency of the evidence) involved in a denial of certification under 8 U.S.C. 1182(a)(14) (Pet. 12). In addressing this issue, the court below stated (Pet. App. 7a–10a):

> * * * We first stress that the section is written so as to set up a presumption that aliens should not be permitted to enter the United States for the purpose of performing labor because of the likely harmful impact of their admission on American workers. This presumption, the statutory language makes clear, can be overcome only if the Secretary of Labor has determined that the two conditions set forth in parts (A) and (B) of the subsection are met. This structuring of the statute strongly indicates that the Secretary is not obligated to prove in the case of every alien seeking entry to perform labor that the conditions are not met. Given the presumption of the statute against admission, if the Secretary's consultation of the general labor market data

readily available to him suggests that there is a pool of potential workers available to perform the job which the alien seeks, the burden should be placed on the alien or his putative employer to prove that it is not possible for the employer to find a qualified American worker.

This interpretation of the statute is supported by its legislative history. Before enactment of the 1965 amendments to the Immigration and Nationality Act, Section 212(a)(14) was structured to permit entry to aliens seeking to perform labor in the United States unless the Secretary of Labor certified that there were sufficient American workers available to perform such labor or that the employment of the aliens would adversely affect the wages and working conditions of American workers. The Senate and House reports on the 1965 amendments to the Act make clear that Congress, by restructuring Section 212(a)(14) to exclude such aliens unless the Secretary certified that there were *not* sufficient American workers available, intended to reverse the prior presumption favoring admission to strengthen the protection of the American labor market and to reduce the burden on the Secretary in implementing this protection. Moreover, Senator Kennedy, who played a major role in shepherding the 1965 amendments through Congress, stated on the Senate floor:

> Under [the old] procedure, the Secretary certifies that aliens falling under certain occupational or skill definitions should be excluded because they will threaten domestic employment. The new bill reverses this procedure. *It places the*

> ***burden of proving no adverse effect on the applying alien.*** The intending immigrant must receive a certificate from the Secretary of Labor that his presence will not affect U.S. employment, wages, or working conditions.
>
> 111 Cong. Rec. (Part 18) 24227 (1965) (emphasis added). [Footnotes omitted.]

Other circuits that have confronted the question of denial of certification have not dealt explicitly with the burden of proof issue. They have generally agreed that the Secretary's determination is presumptively correct and that it will be reversed only if "arbitrary, capricious, [or] an abuse of discretion." See *First Girl, Inc.* v. *Regional Manpower Administrator of the United States Department of Labor,* No. 73–2009, slip op. p. 3, decided July 2, 1974 (C.A. 7); *Ratnayake* v. *Mack,* No. 73–1865, slip op. p. 6, decided June 12, 1974 (C.A. 8); *Digilab, Inc.* v. *Secretary of Labor,* 495 F. 2d 323, 327 (C.A. 1), certiorari denied, No. 73–1904, October 15, 1974. ("Secretary's discretion * * * not lightly to be disregarded"); *Secretary of Labor* v. *Farino,* 490 F. 2d 885, 889–890 (C.A. 7).

These cases deal with a very wide variety of factual circumstances. In the cases petitioners cite (Pet. 12), certain specific factual determinations by the Secretary were found to have been made without evidence. Thus, for example, in *Reddy, Inc.,* v. *United States Department of Labor,* 492 F. 2d 538, 539 (C.A. 5), the court held that there was no evidence that workers were available "at the place" of proposed employment, as required by the statute, despite evidence that workers were available nationally. In

Digilab, supra, the court held that evidence of the availability of workers generally designated as "electrical engineers" did not constitute evidence that there were workers who could do the specialized work the employer sought. While we agree that the courts of appeals have tended to scrutinize closely whether the Secretary's determination is based on evidence relevant to that determination, there is no specific conflict with the instant case, where such evidence was found to exist. The different situations involved may properly result in differing results, even by application of the same standard.

Petitioners' claim essentially amounts to a requirement that the Secretary must issue a certification unless he can point to a specific person who is acceptable to the employer to fill the job. We submit that this is a misreading of the intent of Congress and the language of the statute and that no court of appeals has so held. Thus, the denial of petitioners' claim in the instant case is not in conflict with the decision of any other court of appeals and does not warrant further review.

3. Petitioners also assert that the denial of the certification was based on internal memoranda of the Department of Labor (Pet. 13). Because these memoranda were not published, petitioners contend that the denial of the certification was improper. This claim is insubstantial.

As the court of appeals held, even assuming that the memoranda should have been published, petitioners were not injured. The court stated (Pet. App. 13a, n. 12):

> [5 U.S.C.] 552 states that "[e]xcept to the extent that a person has actual and timely

notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1)(E). Dr. Pesikoff was not adversely affected by not learning of the internal memorandum before this litigation, assuming such a late awareness. He would have stood in no better stead if he had had notice of the internal memorandum before filing his request for Ms. Quintero's certification. If he desires to avoid the memorandum's directive, he can still request certification by representing that Ms. Quintero will work both day and night although, as stressed in text, such a representation would suggest an adverse impact on American working conditions. Indeed, in view of the Secretary's lack of reference to the memorandum in his statement of denial and our finding that the statute directly supported his treatment of the live-in preference, we cannot say that the Pesikoffs were affected by the memorandum at all. Appellants' position would not be advanced if we held the Secretary's general statement of policy as to the matters contained in the challenged internal memorandum to be completely void and without effect. *Compare Lewis-Mota* v. *Secretary of Labor,* 2 Cir., 469 F. 2d 478, 482 (1972).[*]

[*] Petitioners also argue that the instant decision is in conflict with *Lewis-Mota* v. *Secretary of Labor*, 469 F. 2d 478, 482 (C.A. 2), and *Texaco, Inc.* v. *Federal Power Commission*, 412 F. 2d 740, 744 (C.A. 3). In those cases, the failure to publish regulations clearly affected the parties since the regulations required affirmative action by them. Here, by contrast, the internal memoranda did not require action by petitioners and there was no apparent reliance on the memoranda by the Secretary of Labor.

Petitioners argue in the alternative that if the memoranda are valid, "the certification denial was issued in disregard of the Department's rules" (Pet. 16). They contend that there was no reliance on a telephone survey, in violation of subparagraph (5) of memorandum No. 183–69, which states (Pet. 6–7):[4]

> (5) Availability is not determined solely by applicants on file in a local office. Unemployment rates in the area, information from all community sources, and results of recent telephone surveys must be weighed.

The import of this paragraph is that before a certification is *granted,* all four sources must be investigated in order to insure the absence of qualified American workers. Were it to be given the interpretation petitioners suggest (that a prerequisite to *denial* of certification is reliance on all four sources), the department would frequently be required to persist with the ritual of checking alternative sources after having already ascertained through an earlier source that there are indeed American workers available. Once it was determined that there were approximately 180 maids in the Houston area seeking employment through the Texas Employment Commission, there was no requirement that the Secretary continue investigating alternative sources to duplicate this information.

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[4] There apparently was a telephone survey made at some time by the Texas Employment Commission. They noted that "In contacts with employers advertising in the newspapers for domestics, it is found that the response is fair, they find that it is seldom they can find an applicant who is desirable, or who can furnish valid references." (A.R.A., transmittal memorandum of July 20, 1971; Pet. 16).

4. Petitioners also maintain that the court of appeals considered improper factors in reaching its decision (Pet. 18). This apparently refers to the court of appeals' passing reference [5] to petitioners'

[5] The final paragraph of the majority opinion in the court of appeals (with its footnotes 13 and 14) states (Pet. App. 13a–14a): "Given our conclusion that the Secretary's treatment of Dr. Pesikoff's live-in preference was proper and our analysis of Section 212(a)(14), we have no difficulty in finding the Secretary had adequate support for his denial of certification. The Secretary, prior to that denial, had been informed by the Texas Employment Commission that it estimated from independent sources that in excess of 100 workers were available for general maid work in Houston and that 180 workers were registered as maids at the Commission's Houston office. To be sure, the Employment Commission in its report to the Secretary stated that a majority of the registered maids were already employed on a part-time basis [13] and that very few were willing to cook.[14] We think, however, that the general data provided the Secretary by the Commission offered sufficient evidence of a pool of potential workers to support certification denial, at least in the absence of any evidence offered by Dr. Pesikoff or Ms. Quintero proving it was impossible to find an appropriate worker in this pool. Dr. Pesikoff apparently did not attempt to offer any such evidence to the Secretary, and he suggests to us no evidence he could offer on remand. He does not even represent that he made any attempt to contact the maids registered at the office. We think it clear that Congress did not intend Section 212(a)(14) to create an employment placement office in the Department of Labor; there is no onus on the Secretary to provide personal preference employers like Dr. Pesikoff with personal preference qualified American workers."

"[13] Although the Pesikoffs of course wanted a maid to work a full week, we take note of the fact that many part-time laborers seize an opportunity to transfer into a full-time position, at least when the pay is sufficient."

"[14] The Secretary of course might well have reasoned within his expertise that the number of maids willing to cook would be significantly increased if they were offered wages above the level prevailing in Houston for general maids."

failure to attempt to show that none of the maids registered with the Texas Employment Commission was a suitable employee. This statement is not inconsistent with the administrative record. The record reveals that petitioner was not interested in day workers (A.R.A., letter from Mr. Wasserman to Texas Employment Commission, of August 19, 1971; Complaint, pars. 6, 12). Since the Secretary had explicitly informed petitioner that his job description could be filled by a day worker and that there were 180 such workers available, the court of appeals was not substituting its views for that of the administrative agency, as prohibited by *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196, and *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 169. In fact, the Secretary's decision and the court of appeals opinion were both explicitly based on the finding that a day worker could fulfill the job duties petitioner had described and that such day workers were available (A.R.A., Letter from Assistant Regional Manpower Administrator to Mr. Wasserman, September 8, 1971; Pet. App. 10a–12a). The fact that passing reference was also made to several common sense factors which the court apparently regarded as alternative grounds upon which the Secretary's decision could have been based does not warrant reversal.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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